KONG MING BANK BERHAD

v.

LAU PANG THANG & 2 ORS.

HIGH COURT SABAH & SARAWAK, KUCHING
DATO' HJ. ABDUL KADIR BIN SULAIMAN J.
[SUIT NO. KG. 72 OF 1988]
6 OCTOBER 1994

PRACTICE & PROCEDURE: Appeal against decision of Registrar in setting aside judgments in default of appearance against 1st and 3rd defendants - Defendants guarantors - Dispute on rate of interest imposed after judgment - O. 42 r. 12 RHC, s. 16(1) Courts of Judicature Act 1964 - Whether there was an agreement between the parties to pay post judgment interest in excess of 8% p.a. - Whether agreement was an independant covenant which did not merge with the judgment debt - General principles on the doctrine of merger.

This was an appeal against the decision of the learned Registrar in setting aside judgments in default of appearance entered against the 1st and 3rd defendants.

The judgments were entered upon a claim based on a letter of guarantee executed by the defendants in consideration of credit facilities being granted by the plaintiff to Dai Tai Enterprise Sdn. Bhd. (the company). The 1st and 3rd defendants did not dispute their liability but they argued that the rate of interest stated in the judgments was in excess of the statutory maximum of 8% p.a. provided under O. 42 r. 12 of the Rules of the High Court 1980 (RHC) and s. 16(1) of the Courts of Judicature Act 1964 (CJA) which rendered the judgment illegal. The letter of guarantee was silent as to the rate of interest to be imposed on the credit facilities but the letter of offer stated the rate of interest at 15½% p.a. with monthly rests. The question was whether the parties had agreed that the same interest rate would apply after judgment was entered. Counsel for the plaintiff argued there was such an agreement as the words in the guarantee stated interest was payable whether the relationship of banker and customer had ceased or not.

The issues before the Court were whether there was an agreement between the parties to pay post judgment interest at more than 8% p.a. and if in the affirmative, whether that agreement was an independant covenant which did not merge with the judgment debt.

Held:

[1] In order to penalise the defendants into paying more than the statutory rate of interest after judgment the plaintiff must so express and be certain in the words used in the agreement. The onus is plainly on the party who claims interest in excess of the statutory rate of 8% to satisfy the Court that it is so. The agreement must be construed strictly and the provision on interest in this case was far too vague to incorporate an agreement on interest rate after judgment. Therefore there was no agreement by the parties to state what the interest rate was to be after judgment had been entered and the defendants were entitled as of right to set aside the judgment in default of appearance as being illegal.

[2] In the present case there was no separate clause on interest. In the opening paragraph to clause 1 where the defendants agreed to pay all money and liabilities...together with interest "on all such debts and liabilities to the date of payment with monthly rests (whether the relation of banker and customer has ceased or not)", the inevitable conclusion after construing the clause in its entirety was that the plaintiff had not phrased its interest clause with sufficient clarity as to afford the meaning that it was an independent covenant to pay the interest above the statutory rate of 8%. So it merged with the judgment. In the premises the judgment in default of appearance obtained against the 1st and 3rd defendants were irregular judgments.

[Appeal dismissed. Decision of the Registrar affirmed. Costs here and before the Registrar to the 1st and 3rd defendants].

Cases referred to:

Amalqamated Investment & Property Co. Ltd. v. Texas Commerce International Bank Ltd. [1982] 1 QB 84. ***(refd)***

Anlaby v. Praetorius [1888] 20 QBD 764. ***(refd)***

Economic Life Assurance Society v. Usborne & Ors. [1902] AC 147. ***(refd)***

Exparte Fewings [1884] 25 Ch. D. 338 ***(refd)***

Hong Leong Finance Ltd. v. Famco (S) Pte. Ltd. & Ors. [1993] 1 SLR. ***(cit)***

Lee Ah Chor v. Southern Bank Bhd. [1991] SCR 285. ***(foll)***

Malayan United Bank Berhad v. Mohammed Salleh bin Mohammed Yusoff & Ors. [1988] 3 MLJ 165 / [1988] 2 CLJ 460 ***(refd)***

MBF Finance Bhd. v. Malaysia Air Charter Co. Sdn Bhd. & Ors. [1987] 2 MLJ 719 / [1987] CLJ 291 ***(refd)***

Public Finance Bhd. v. Lee Bee Rubber Factory Sdn. Bhd. & Ors. [1994] 1 MLJ 495 / [1994] 2 CLJ 646 ***(cit)***

Standard Chartered Bank v. YB Edward Esnen & Ors. [1989] 3 MLJ 117. ***(refd)***

Supreme Finance (M) Bhd. v. Koo Sin Ken [1987] 1 MLJ 296 / [1987] CLJ 374 ***(refd)***

Syarikat Joo Seng & Anor. v. Habib Bank Ltd. [1986] 2 MLJ 131. ***(refd)***

Tengku Aishah & Ors. v. Wardley Ltd. [1993] 1 SCR 337 / [1992] 2 CLJ 1278 ***(refd)***

United Malayan Banking Corporation Bhd. v. Mideast Development Sdn. Bhd. & Ors. [1991] 1 MLJ 55 / [1990] 2 CLJ 867 ***(refd)***

Wardley Ltd. v. Tunku Adnan [1991] 3 MLJ 366. ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 16(i)

Rules of the High Court 1980, O. 42 r. 12, O. 19 r. 7(1)

Other sources referred to:

Encyclopedia of Forms & Precedents, 4th. Edn., p.40, n.80

For the plaintiff- Kilat Beriak; M/s. Chew, Jugah, Wan Ullok, Goh & Co.

For the 1st & 3rd defendants- Kho Lik Kiat (Gabriel Wong with him); M/s. Chan, Kho & Loy

JUDGMENT

Hj. Abdul Kadir bin Sulaiman J:

By a Notice of Appeal dated the 13 December 1993 the plaintiff appeals against the decision of the learned Registrar of the High Court in setting aside judgments in default of appearance entered against the 1st and 3rd defendants.

The said judgments were entered pursuant to applications by way of Summons In Chambers filed by the said 1st and 3rd defendants. In their applications, the 1st and 3rd defendants prayed for the judgments in default entered against them be set aside or alternatively for the interest rates stated in the said judgments be reduced from 12.25% p.a. to 8% p.a. from the date of judgment until payment.

The claim upon which the judgments were entered was based upon a letter of guarantee dated the 21 June, 1984, which was executed by the 1st, 2nd and 3rd defendants as consideration for credit facilities in the form of an overdraft account and a fixed loan granted by the plaintiff to Dai Tai Enterprise Sdn. Bhd. When Dai Tai Enterprise failed to service the credit facilities in the manner as agreed by the parties, letters of demand were issued to the 1st, 2nd and 3rd defendants which culminated in this claim before the Court.

At the outset, it is clear that the 1st and 3rd defendants are not disputing liability. This stance is also admitted by learned Counsels for the defendants in their Court appearances before the learned Registrar High Court, Kuching and before me. The only bone of contention between the parties which is to be decided by the Court is the rate of interest stated in the said judgments which is 12.25% p.a. from the date of judgment until date of payment. The 1st and 3rd defendants argued that this rate is far in excess of the statutory maximum of 8% p.a. as provided under O. 42 r. 12 of the Rules of the High Court and s. 16(i) of the Courts of Judicature Act 1964 thus rendering the judgment illegal. O. 42 r. 12 provides:

> 12. Every judgment debt shall carry interest at the rate of 8 per centum per annum or at such other rate not exceeding the rate aforesaid as the Court directs (unless the rate has been otherwise agreed upon between the parties), such interest to be calculated from the date of judgment until the judgment is satisfied.

The words in bracket above was added by PU(A) 445/86. Thus the position prior to PU (A) 445/86 was that post judgment rate of interest must not exceed 8% p.a.

However s. 16(i) of Courts of Judicature Act 1964 has incorporated in its proviso that the interest rate can be more than 8% p.a. if the parties agreed that it be so.

> 16. Rules of court may be made for the following purposes:
>
> (a) - (h) ...
>
> (i) for regulating the rate of interest payable on all debts, including judgment of debts, or on the sums found due on taking accounts between parties, or on sums found due and unpaid by receivers or other persons liable to account to the Court:
>
> Provided that in no case shall any rate of interest exceed eight per centum per annum, unless it has been otherwise agreed between parties;
>
> (j) - (p) ...

Apparently O. 42 r. 12 was amended to bring it in line with s. 16. As Justice Zakaria Yatim said in *Malayan United Bank Berhad v. Mohammed Salleh bin Mohammed Yusoff & Ors.* [1988] 3 MLJ 165 s. 16(i) is only an enabling provision and does not confer any power on the High Court regarding interest but only to the Rules Committee to make rules to regulate the rate of interest payable on all debts.

The plaintiff's argument before the Court is simple: The parties herein have agreed that the post judgment interest be at 12.25% p.a. on monthly rest (reduced from 15.5% as stipulated in the plaintiff's letter of offer Exhibit 'A' to Goh Lee Miang's affidavit opposing the application to set aside the judgment in default).

In *Anlaby v. Praetorius* [1888] 20 QBD 764 Lord Justice Fry laid down the principle that where a plaintiff has obtained judgment illegally, the defendant is entitled *ex debito justitiae* to have such judgment set aside; and the Court has only power to impose terms upon him as a condition of giving him his costs. The principle was so applied by our Supreme Court in the case of *Syarikat Joo Seng & Anor. v. Habib Bank Ltd.* [1986] 2 MLJ 131. However these 2 cases dealt with irregular judgments in default which were entered as a result of a premature entry of judgment (in *Anlaby's* case) and a failure to first obtain leave under O. 19 r. 7(1) of the Rules of the High Court 1980 before entering judgment (in *Syarikat Joo Seng's* case). Cases more in point as submitted by learned Counsel for the 1st and 3rd defendants are the following cases which dealt with illegal judgments in default as a result of interest far in excess of the statutory rate allowed under our Rules:-

(1) *United Malayan Banking Corporation Bhd. v. Mideast Development Sdn. Bhd. & Ors.* [1991] 1 MLJ 55.

(2) *Malayan United Bank Bhd. v. Mohd. Salleh bin Mohd. Yusoff & Ors.* (supra).

(3) *MBF Finance Bhd. v. Malaysia Air Charter Co. Sdn. Bhd. & Ors.* [1987] 2 MLJ 719.

In *United Malayan Banking Corporation's* case the plaintiff entered judgment in default of defence with an interest rate of 15% p.a. until payment. The 2nd defendant applied to set aside the said judgment on the ground that the guarantee agreement stipulated the rate of interest at 12% p.a. and although the interest was varied to 15% they were not given a written notice of the variation as stipulated in the agreement. They argued that the plaintiff cannot claim for more than 8% p.a. interest after judgment as O. 42 r. 12 (prior to the amendment vide PU (A) 445) does not provide for post judgment interest in excess of 8% p.a. Abu Mansor J. agreed with the plaintiff's submission and held that the judgment in default of defence was illegal because the pre judgment interest rate should be 12% and the post judgment interest should remain at 8% p.a. as the Rules does not allow that it be more than that.

The earlier decision of Zakaria Yatim J. in *Malayan United Bank Bhd's* case also hinges upon the same argument. As the Rules (then) did not allow post judgment interest for more than 8% p.a. the judgment in default of appearance entered against the 4th defendant containing interest at 17.75% p.a. from date of judgment until satisfaction of the same is illegal and must be set aside.

The Supreme Court in *MBF's* case had held on to a similar view that O. 42 r. 12 (then) cannot confer upon the plaintiff the right to claim more than 8% post interest rate and neither does the proviso to s. 16(i) of the Courts of Judicature Act 1964. In that case the plaintiff entered judgment in default with interest at

2% p.m. on the judgment from the date of judgment until actual payment. The rate 2% p.m. was derived from Article 18 of Equipment Lease Agreement entered into by the parties and this article provided that the 1st defendant (lessee) shall pay an additional interest of 2% p.m. on arrears calculated from the date the amount is due until the date of actual payment. The Supreme Court held that this interest rate is only payable so long as there is arrears due or remains due under the agreement to enable the applicant (plaintiff) to sue upon it and enforce payment but once payment has been obtained, the debt merges with the judgment because the arrears now is payable under the judgment and not under the agreement anymore and the plaintiff is only permitted to claim 8% p.a. as post judgment rate.

The Supreme Court laid down the principle (after consideration of three English authorities) that any agreement on the payment of interest is to be construed strictly by the Courts and the onus is plainly on the party who claims interest in excess of the statutory rate of 8% p.a.

For the moment the relevance of these cases to our present case is this: that a post judgment interest rate which is in excess of the statutory minimum is illegal and would entitle the Court to set aside the judgment *ex debito justitiae*. Thus if the defendants herein can prove that the plaintiff is not entitled to the 12.25% stated in the judgments, there is no discretion left to the Court. The judgments must be set aside.

I would approach the issue in this case in this manner. First whether there is an agreement between the parties to pay post judgment interest at more than 8% p.a.

Secondly, if the answer to the first question is in the affirmative, whether the agreement to pay interest in excess of the statutory rate is an independent covenant which does not merge with the judgment debt. In other words whether the doctrine of merger applies in this case.

It is not disputed that the letter of guarantee is silent on rate of interest to be imposed on the fixed loan and overdraft facilities **let alone the rate of interest to be imposed after judgment is obtained.** All the Joint & Several Guarantee (Exhibit 'B' to Goh's affidavit) provides is that the 1st, 2nd and 3rd defendants herein jointly and severally guaranteed payment on demand of all monies and liabilities ..." together with interest on all such debts and liabilities to the date of payment with monthly rests (whether the relation of banker and customer has ceased or not)". The letter of offer (Exhibit 'A') however states the rate of interest at "15½% p.a. with monthly rests or such rates as may be prescribed by us from time to time at our absolute discretion. Interest will be charged at higher rate as may be fixed by the bank from time to time on amount exceeding the limited sanctioned" for the overdraft facility.

In respect of the fixed loan interest is stated as follows "15½% p.a. with yearly rests or such rates as may be prescribed by us from time to time at our obsolute discretion."

Learned Counsel for the 1st and 3rd defendant urged the Court not to read the letter of offer into the guarantee but learned Counsel for the plaintiff submitted before the Court the case of *Lee Ah Chor v. Southern Bank Bhd*. [1991] SCR 285

to support their contention that failure to state the rate of interest in the guarantee is not fatal to their claim.

In *Lee Ah Chor's* case, Southern Bank granted an overdraft facility to a company secured by a continuing guarantee executed by the applicant and other directors of the company. A second guarantee was later executed by the other directors except the appellant. Apparently the first guarantee failed to state the rate of interest payable and Counsel for the appellant raised the point (amongst others) that the guarantee was void for uncertainty. The Supreme Court failed to agree with him and held that notwithstanding the omission to state the rate of interest the guarantee is still valid as the letter of offer from the bank did. Interest is stated at 16% p.a. The Supreme Court held that the guarantee must be read together with the letter of offer and Mohd. Jemuri, SCJ quoted with approval Lord Denning MR in *Amalgamated Investment & Property Co. Ltd. v. Texas Commerce International Bank Ltd.* [1982] 1 QB 84 at pages 118 - 119 when His Lordship said that the Judge should not have "construed the guarantee in its strict literal sense - all by itself - without regard to the letters which accompanied it - and without regard to the surrounding circumstances - or the factual matrix to use the modern equivalent".

I cannot argue with the reasoning in *Lee Ah Chor's* case and accept learned Counsels contention that the letter of guarantee must be read together with the letter of offer. So the upshot of this is the rate of interest on the overdraft and fixed loan guaranteed is 15.5% p.a. (later reduced to 12.25%).

However, the big question is, does it mean that the parties have agreed that the same interest rate applies after judgment is entered? Learned Counsel for the plaintiff said yes, because the words in the guarantee states payment of interest whether the relation of banker and customer has ceased or not. He relied on this phrase to persuade the Court that this means that after judgment is entered and the plaintiff and defendants are no longer banker or customers but more of judgment creditor and judgment debtors, the interest rate of 12.25% still applies. I find this argument too far fetched. In order to penalise the defendant into paying more than the statutory rate of interest after judgment the plaintiff must so express and be certain in the words used in the agreement. As quoted earlier, the onus, said Seah SCJ in *MBF's* case (*supra*) is plainly on the party who claims interest in excess of the statutory rate of 8% to satisfy the Court that it is so. The agreement must be construed strictly and the provision on interest in this case is far too vague, to my mind, to incorporate an agreement on interest rate after judgment. Though this strict construction may be harsh on the plaintiff but the plaintiff has decided to come to Court to assist him in executing the debt due to him (*MBF's* case and *Supreme Finance (M) Bhd. v. Koo Sin Ken* [1987] 1 MLJ 296). For that assistance he has to abide by the statutory rate of interest provided by the Rules.

Therefore I conclude that there was no agreement by the parties to state what the interest rate was to be after judgment has been entered and the defendants herein are entitled as of right to set aside the judgment in default of appearance as being illegal.

Assuming I was wrong in coming to the above conclusion I will now go on to the next question of whether the doctrine of merger applies. Both Counsels have

submitted a number of case authorities each to show the Court instances where the doctrine was or was not applied both in England and in Malaysia.

As a start, the general principle on the doctrine of merger is stated as thus:

> When there is a covenant for the payment of a principal sum and a judgment has been obtained upon the covenant for that sum, it is plain that the covenant is merged in the judgment, and if there is a covenant to pay interest which is merely incidental to the covenant to pay the principal debt, that covenant also is merged in a judgment on the covenant to pay the principal debt. **Of course a covenant to pay interest may be so expressed as not to merge in a judgment for the principal;** for instance if it was a covenant to pay interest so long as any part of the principal should remain due either on the covenant or on a judgment" per Fry LJ in *Exparte Fewings* [1884] 25 Ch. D. 338 at page 335. (the emphasis is mine).

The above view was endorsed and shared by the House of Lords in *Economic Life Assurance Society v. Usborne & Ors.* [1902] AC 147 and in our Malaysian Courts such as the case of *Supreme Finance* (supra) and the Supreme Court case of *Tengku Aishah & Ors. v. Wardley Ltd.* [1993] 1 SCR 337. Selvam JC in another case of *Wardley Ltd. v. Tunku Adnan* [1991] 3 MLJ 366 at page 368 had even diligently distilled 3 propositions of law from *Exparte Fewing's* and *Economic Life Assurance Society's* cases. These 3 propositions are:

(1) Where a contract provides for the repayment of 'principal sum with interest', the right to interest will merge in the judgment together with the claim for the principal sum.

(2) Where a contract or a subsequent agreement expresses the right to repayment of the principal interest as independent rights, there will be no merger of the interest claim into the judgment for the principal sum.

(3) Where a security document entitles the creditor to retain his security until he is paid the full amount of his principal and interest, the right to full interest will not be affected by any merger of the interest covenant into a judgment against the debtor. In other words, full interest is recoverable in an action to realize the security (foreclosure) or the freeing of security (redemption).

From a reading of these cases it is clear that whether the doctrine of merger applied or not depended very much upon the construction of the covenant on interest. To quote Lord Davey in *Economic Life's* case (at page 153) "it was a mere question of the construction of the instrument ..." A true construction of the covenant would reveal whether the covenant falls under proposition (1) or (2) of *Wardley's* case.

In our present case, there was not very much to construe. Like the words emphasised in the quotation taken from Fry LJ's judgment the covenant to pay interest may be so expressed as not to merge in a judgment. I cannot by any stretch of imagination apply to the words in the guarantee herein any covenant to pay **post judgment interest** at the same rate of 15.5% as stated in the letter of offer. The words in **both** the letter of offer and guarantee are too general in nature. Contrast the way the interest provision is worded in this case with that in *Wardley's* case where the interest provision, said Selvam JC, was expressed as an independent term which would survive any judgment for the principal debt

and it read **"as well after as before judgment".** This he construed meant that the covenant to pay interest is independent of the judgment itself.

Another example would be *Tengku Aishah's* case (supra). Clause 11.4 in the agreement between the parties clearly detailed that the interest **"as well after as before judgment"** be at the rate of 4½% above the rate as determined by the bank. It was held by the Supreme Court that this clause 11.4 was intended to be an independent contract and was not incidental or ancillary to the covenant to repay the principal sum together with interest.

Yet another example is the case of *Standard Chartered Bank v. YB Edward Esnen & Ors.* [1989] 3 MLJ 117 where the interest clause holds the words 'as well after as before any judgment at the rate ... demand by the bank until payment'. This was construed by Haidar J. as an independent covenant that does not merge with the judgment.

There are other cases cited by plaintiff's Counsel to support their contention that the covenant to pay interest herein is an independent covenant. The first is the case of *Public Finance Bhd. v. Lee Bee Rubber Factory Sdn. Bhd. & Ors.* [1994] 1 MLJ 495. Although in this case the words "after as well as before judgment" or words to that effect was not used, nonetheless the intention of the parties was made clear by the words that the interest is "from the date due until **payment is made in full** by the lessee with such interest" (the emphasis is mine). This, Edgar Joseph Jr. SCJ, said constituted an independent covenant to pay interest.

The other is the Singapore case of *Hong Leong Finance Ltd v. Famco (S) Pte. Ltd. & Ors.* [1993] 1 SLR where the same conclusion as in *Public Finance's* case was reached in view of the clarity of the interest clause which stated the rate of interest as being 16% p.a. "from the due date until payment is made".

In our case and to start with there is no separate clause on interest. It appeared in the opening paragraph of clause 1 where the defendants agreed to pay all money and liabilities ... together with interest "on all such debts and liabilities to the **date of payment** with monthly rests (whether the relation of banker and customer has ceased or not)". To my mind, the inevitable conclusion after construing this clause in its entirety, is that the plaintiff has not phrased its interest clause with sufficient clarity as to afford a meaning that it is an independent covenant to pay interest above the statutory rate of 8% p.a. So it merges with the judgment.

As quoted by Selvam JC in *Wardley's* case, The Encyclopedia of Forms & Precedents (4th Ed) at p 40 n 80 stated that it is common practice in mortgages to provide that interest shall be payable at the specified rate as well after as before any judgment. I would add that if the parties chooses not to be clear in their phraseology, then the plaintiff must suffer the peril of attaching the statutory rate of interest to the period after the judgment until full payment is recovered.

In the premises I hold that the judgment in default of appearance obtained against the 1st and 3rd defendants are irregular judgments and accordingly the appeal is dismissed and the decision of the learned Registrar is affirmed. Costs here and before the learned Registrar to the 1st and 3rd defendants.